IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

ID IMAGE SENSING LLC,)
)
----------Plaintiff,)
) Case No.
vs.) 20-CV-136-RGA-
) JLH
)
OMNIVISION TECHNOLOGIES, INC.,)
)
----------Defendant.)

TRANSCRIPT OF DISCOVERY CONFERENCE

DISCOVERY CONFERENCE had before the Honorable Jennifer L. Hall, U.S.M.J., via teleconference on the 16th of February, 2022.

APPEARANCES

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-and-

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MICHAEL EDUCATE, ESQ.

Counsel for Defendant

THE COURT: This is Jennifer Hall. We are here for a teleconference. This is Image Sensing versus Omnivision Technologies, Case Number 20-CV-136-RGH-JLH. We have a court reporter on the line today. The court reporter is Deanna Warner.

May I have appearances, please, starting with the plaintiff.

MR. FARNAN: Good afternoon, Your Honor. This is Michael Farnan. With me on the line is Corby Vowell from Friedman, Suder, and Cooke.

THE COURT: Good afternoon.

May I have appearances for Defendant.

MS. FARNAN: Good afternoon, Your Honor. For Defendant OmniVision, it's Kelly Farnan from Richards, Layton, and finger. I'm joined by my co-counsel David Bluestone and Michael Educate from Barack Ferrazzano, and Mr. Educate will handle the ESI issues, and Mr. Bluestone will be handling the acquisition document issue.

THE COURT: So I can tell you I've reviewed the letters and the attachments, and I have a couple thoughts about what might be

going on here, but I'll give each side a few minutes to add anything they want to add, and I have some questions as well.

So this is Defendant's motion, so I'll hear from Defendant first. Go ahead, counsel.

MR. EDUCATE: Good afternoon, Your Honor. This is Michael Educate on behalf of Defendant Omnivision. The last name is spelled E-d-u-c-a-t-e just for the record.

So I think in brief, Your Honor, what the briefing by both parties demonstrates is that the search terms that have been already run by Plaintiff are demonstrably inadequate, given what they've searched for is the patent, the plaintiff's own name, the defendant's name, and the inventor's first and last name. We know that these searches have been inadequate because they have not captured all relevant documents for this case.

Exhibit G to our initial motion demonstrates this, for example, that because they searched for the first and last name of the inventor, they didn't initially find that e-mail and later had to provide it. When we had a meet-and-confer, Your Honor, on

February 10th, the plaintiff indicated that they may need to search for more e-mails related to the patent and they may need to make a fourth supplemental privilege log when we've already had four previous logs that they continue to add additional documents as they find them, including custodians, Your Honor, that were not initially disclosed in their initial ESI Rule 3 disclosures.

At this point, Judge, the plaintiff has not asserted that we have mischaracterized the ESI rules in part 5B, that absent a good showing of cause we can ask for up to ten more terms. Instead, they are simply refusing to simply run the terms in the first place. And we asked them, if you think it's overbroad, please let us know, and we'll narrow the scope. They refused to even do that, despite the fact that, based on their response, they have not established why any of these terms are overbroad. There is nothing to suggest about Plaintiffs or the operations of its parents that would suggest that these search terms would capture a massive swath of materials related to image sensors or the underlying

technology, given the nature of the plaintiff and the nature of this plaintiff in particular.

I'm happy to go term by term if there are questions, Your Honor, but at bottom, I think what we want, given that discovery is still moving and we have depositions we'd like to take before the close, that they need to run these terms so that we can get a sense of what documents are still out there that are relevant to the case.

THE COURT: I don't have any questions about the particular terms. I'll hear from the other side before I ask you any further questions about those terms, but I guess a broader question is how did we get here today? When you all were discussing the document requests and what would be produced and what wouldn't be produced, did you not work together to discuss what search terms were going to be applied? And why didn't propose them back at the time? I know I'm going to hear from the other, and maybe that's not an issue, but how did this happen, where we're here and they've already done their collection?

MR. EDUCATE: That's a fair question,

Your Honor. So at least from our perspective, what happened here was when we first initially exchanged document requests and had responses, we had asked them several months before they disclosed the search terms on December 7th to identify what search terms they were running, and there was a delay in their response until that date. And, obviously, that was three days before the December 10th deadline when we had to substantially complete our production, which Defendant did. And in this case, we responded, look, these are inadequate, given what you disclosed. We would like to run these additional ones, and to date, they've refused. That's sort of the abridged version of how we arrived here.

THE COURT: I appreciate that. Let's turn it over to the other side just on this issue about the search terms.

So you say it's an undue burden to search for the requested search terms. How can the Court make that determination without a hit count or some other way that would capture --

MR. VOWELL: Sorry, Your Honor. This is Corby Vowell for the plaintiff.

Your Honor, one of the unique things here about this particular situation, as you can tell from the papers, is that the plaintiff, ID Image Sensing, has a parent company that, essentially, has most of the documents that would be related to -- and including e-mails -- that would be related to this particular patent case, and there are not separate employee e-mails for this -- in particular for this -- this entity.

Instead, it's employees of Acacia that have the Acacia e-mail domain addresses, and because Acacia has a number of different both current and past subsidiaries that, as the Court may or may not be aware, actively license and enforce patents related to other technologies, some that might overlap a bit with this, this particular technology, but certainly a lot of other entities that have documents and e-mails or would encompass e-mails that relate to other high-tech area, CMOS technology, semiconductor chips as the In Depth Test entity that was mentioned here, and those technologies, while all high-tech technologies, are, ultimately, not particularly

related here.

And because of the nature of the business, it would be undue burden because it would essentially be searching across every -- e-mails and other documents related to every other subsidiary of -- or at least it would encompass, potentially, e-mails and documents related to all those other subsidiaries with unrelated patents that are not at issue here and the technology is not at issue.

THE COURT: Let me understand here, though, because you did this once with a bunch of different search terms. Why is "Dwight and Poplin" a reasonable search term but "Poplin" is not a reasonable search term?

MR. VOWELL: Well, Your Honor, on that one in particular, I think we could probably agree that because the name is unique enough, the last name, that perhaps "Poplin" by itself might be okay. I don't know what else that could encompass, but it might encompass other things.

But as to the others on here that are just more generally related to certain areas of technology or the "OmniVision and patent" or

"CMOS and license," those are just way too broad, and although we were able to run to the other search terms, we picked those to try to narrow down to the scope of what is relevant to this case. I think we did an adequate job of that.

Unfortunately, the plaintiff does not have many documents related to this patent, and that's partly due to the way it was acquired and that the inventor does not work for the plaintiff. He works for a different company. We do not -- the defendants or the defendant has now subpoenaed documents from Mr. Poplin and are planning to take his deposition, so many of the documents that you would see in a normal patent case that get produced by the plaintiff, we do not have or have access to.

THE COURT: I completely understand that. Let me ask you this: What makes you -- facially, I'm looking at OmniVision and patents, and I can see in certain areas of technology that that might be overbroad. Do you have reason to think that other companies in the corporate family have been thinking about suing OmniVision or have sued OmniVision

such that you can just really say for sure that's way overbroad?

MR. VOWELL: Well, Your Honor, without getting into privileged information, for sure, as I sit here today, I can't say for sure one way or the other. I know that when we did our initial search with the terms that we had, which included OmniVision and '145 -- I didn't want to limit it just to the full patent number, as patents are often referred to by the last three numbers -- I was comfortable that we would get anything related to OmniVision that's relevant because it would be related to this patent or contention analysis or related to the patent in this case.

But I don't have any specific evidence to say for sure that the term "OmniVision" by itself would bring up too many different things, but it's just a collective group of terms that they have here. If you run all of these, it will very, very likely result in a significant -- it will take time not only just to search them and get the search results but then the vast majority of that, we believe, will be completely irrelevant, so it's also

attorney time reviewing and reviewing for privilege and relevancy and responsiveness, so we think all of that puts an undue burden on.

THE COURT: Okay. Let me put you back over to Defendant to comment on anything you just heard.

MR. EDUCATE: Thank you, Your Honor. I think I can certainly agree with Mr. Vowell on one thing. This is not a normal patent case. The plaintiff has produced 103 documents to date. The defendant has produced thousands and a hundred thousand pages. We don't think that it is an undue burden for the plaintiff to run these terms.

Just to give you an example, Your Honor, one of the ones we identified is the term "camera module." That's what they called the patent in the settlement agreement. They referred to it as a camera module, and I can refer to Exhibit B of our documents we provided on page 13 for that. If they have concerns about terms like that, when last I checked, the plaintiff nor its parent are exclusively in the business of litigating patents related to camera modules or image sensors. There's

nothing in record that demonstrates that it's undue burden. I think the plaintiff was given a disproportionate amount of discovery that Defendant has provided at its own expense.

Again, I won't go through these terms one by one, but we purposely tried to target this to terms that either they have used in their complaint, as such as the words "strong image center" or words they use to describe the patent such as "camera module" or to identify entities that we know that are relevant based on the limited documents they provided, in particular "Fairchild" or "semiconductor" and other terms related to the entity from whom Acacia received this patent in the first place. So we don't really see a basis to say these are inappropriate.

THE COURT: Let me ask you about the first one, and maybe this is going to start to transition into the second part of the argument and so maybe you might not be the person to ask about this.

But the first one, I take you to be saying, look, we want to have documents showing the negotiation of the Fairchild litigation

because those are relevant to a number of things, including the parties' valuation of the patent as well as other things that Fairchild or FTM or Semi told the plaintiff company, Image Sensing Company, about the patent. You made an argument as to why it's irrelevant, so I get that. But this first --

MR. VOWELL: Your Honor -- go ahead.

THE COURT: The first search string is really going to capture more than that. It seems to me, the way it's drafted, it looks like it's going to capture any document at all relevant to that litigation, and that's more than you need, isn't it?

MR. VOWELL: Well, Your Honor, on that point, I think that's -- that's a fair observation. In that sense, we can limit these by time as well so that we're trying to capture the relevant time period when they would have been negotiating the settlement agreement.

In addition, Your Honor, this goes back to the point you mentioned earlier about how do we know the burden without knowing the result of the searches. To the extent that Plaintiff is willing to say these are results we got,

here are some that are clearly disproportionate, we're happy to talk to them, but we haven't reached that first stage.

THE COURT: Just following up on the point you made about the time limitation, is that something you could also work with them on for an OmniVision search string, so I guess if they have some related company that thought about suing you that they don't have to go through and review all those?

MR. VOWELL: That would be more than appropriate.

THE COURT: Yeah. Okay. Let me hear the argument on the second issue, because I do think the two issues are related on the -- the documents related to the agreements with Fairchild and the assignments from Aptiva.

MR. BLUESTONE: Your Honor, this is David Bluestone on behalf of OmniVision. To give context where this arises from, OmniVision served Interrogatory Number 13 on November 22nd. It asked to describe all facts and circumstances related to ownership or license of the patents, et cetera. The responses referenced two agreements that they

had produced pursuant to Rule 33(b). We followed up with a letter on December 27th saying you have to produce all the documents. The final agreements are not sufficient.

There are two facts that I think are really important in getting to the appropriate conclusion here. OmniVision is seeking the negotiations in the company communications only for the agreements in which Acacia subsidiary and predecessor interest to the plaintiff acquired the patent in suit here. There is no dispute at the time related to the '145 patent. The discovery we seek relates to an agreement in which the '145 patent was not in dispute. It was merely an asset exchanged. As such, there are no Rule 408 sensitivities as all.

This is the most relevant factor. This is grand factor one, Your Honor, in the patent damages side of the universe. What was the actual value exchanged for the patent in suit? And again, in this circumstance, the agreement just says that it assigns it, and there's a whole list of relevant information that you're already aware of by what you said previously on this call, Your Honor, so I won't waste your

time on it, but it's clearly relevant information that just we can't get by the final agreement itself.

I'll leave it there. If you have any further questions, there's more I can talk about, but I'd like to keep it simple to start here.

THE COURT: No, I appreciate that. I don't have any further questions. Let's switch it over to the plaintiff.

Why don't you tell me about the communications relevant to the negotiations leading to the assignments.

MR. VOWELL: So, Your Honor, just for some context here, I can tell you that my firm and I was one of the lawyers that represented that other entity, In Depth Test, in that litigation and was involved, to some extent, in the settlement discussions and negotiations, so I have some context for that and understand what happened.

That settlement, as you can imagine, was focused on resolving a list of litigation that had been ongoing for several years, and it ultimately culminated in the terms of the

agreement that the defendant has, and it involved monetary consideration, and it involved assignment of three patents, as Your Honor is aware from the papers. So all of the terms and information related to the settlement really is subsumed within that final agreement.

I think in most other contexts -- and I've seen other cases and this Court has referenced this in other situations, where generally speaking the negotiations and communications related to settlement negotiations are less probative than the final agreement because that's, ultimately, what the parties agreed upon. So we've given that to them, and we don't see a need for them to have all of the other communications that involved, whether it was settlement offers or terms of the agreement or drafts of the agreement that, ultimately, the parties did not, you know, come to an agreement on, and that the final agreement should be sufficient.

THE COURT: Okay. I understand your position. Thank you, counsel.

So after hearing everything everybody said today, I think I'm ready to rule on this

dispute, so just bear with me. We'll start with the second issue that we talked about today.

I agree with the defendant that the plaintiff is going to have to produce documents relating to the agreements whereby it acquired these three patents, and just to be clear, I take Plaintiff's point that maybe some marginal relevance of what the '145 patent is worth wouldn't be worthwhile in doing a search for all these negotiations. However, Defendants have proffered other issues that these documents might be relevant to.

And that takes me to the second portion of the ruling. We've got a list of search terms that defendant wants run. I'm going to order that the "Poplin" search term be run, and I understood that counsel for plaintiff was willing to do that when we spoke on the phone today.

With respect to the first term, I think we have an acknowledgment from Defendant on the phone that this is too broad and so, thankfully, counsel for Plaintiff has got detailed knowledge about when the settlement

negotiations were occurring, so hopefully you all should be able to work out either a time limitation or additional terms that might be added to this search string whereby the parties could limit the search and ease the burden on plaintiff in having to search through strings that may not be probative to the issues that Defendant is entitled to explore with respect to the '145 patent.

With respect to "camera module," "image sensor," and "strobe," Plaintiff needs to run those terms and provide hit counts to Defendant and then the parties need to meet and confer about further limitations as appropriate.

With respect to the "OmniVision" search term, I take Plaintiff's point that this might turn out to be burdensome in that it might capture a whole host of other documents that sister companies might have created when they were thinking about suing OmniVision, but we don't really know if that's the case or not, and I heard Defendant on the phone today saying that they were willing to discuss time limitations. So the parties need to meet and confer on that string.

And then finally we have "CMOS" and "license," and that request is going to be denied.

So hopefully, that gives you all enough guidance to move forward. Does Plaintiff have questions about the scope of the ruling?

MR. VOWELL: Yes, Your Honor, just some clarification about the second issue we discussed about settlement negotiations. I want to make sure I understand what Your Honor is requiring us to produce. So it would be, I guess, communications and/or other documents that are related to or that were part of settlement discussions between the parties. Is the Court also requiring us to produce drafts of that agreement?

THE COURT: Yes. If they were exchanged with the other side, yes. If you've got internal drafts that you'd like to mark as privileged, I would hope that you'd be able to work with the other side, that instead of creating a document-by-document privilege log or something like that that you could figure out a way to get those logs without having to go document by document.

MR. VOWELL: We're happy to work with the other side on it.

THE COURT: Yeah.

MR. VOWELL: And that would also be limited in time to the scope -- it would be limited in time of the scope of the -- I'm sorry.

THE COURT: Entitlement. Because of course, as we all recognize, the Fairchild litigation involved Morris and the '145 patent didn't involve it at all, except for the fact that it was transferred at the end of it.

MR. VOWELL: Right, Your Honor. With that clarification, I think I understand the Court's ruling.

THE COURT: All right. Very good. Any questions from the defendant?

MR. BLUESTONE: Yeah, Your Honor. This is Mr. Bluestone. I think I have a suggestion of the time frame thing that might be worthwhile for us to consider.

To the extent that there was a time frame in those negotiations before which there's no asking for a patent in return, if you will, or some acquisition of the patent that's going

back to the Acacia entity, we don't really care. For example, if there was an initial offer to dismiss the Fairchild case and there were no patents coming back within a month of filing, that's not probative. We don't care. But the time frame immediately preceding the acquisition of the patent -- or acquisition back to the Acacia entity comes into play through the conclusion to the final agreement, would be the time frame I would be thinking of as relevant.

THE COURT: Well, that sounds like a perfectly reasonable suggestion to me, so I would ask you to propose it to the other side and have a meet and confer, and I think you all should be able to get it resolved from there.

MR. BLUESTONE: Thank you, Your Honor.

THE COURT: Any other questions?

MR. VOWELL: Nothing from the plaintiff, Your Honor.

MR. BLUESTONE: Just because fact discovery is going to be closing soon, I just hope that we can have conversations even this week with the other side. We're available

through this week, and hopefully we won't have to bother you any more.

THE COURT: That sounds outstanding, but if you need any more assistance, we're here. Just go ahead and file another motion for a teleconference in accordance with the discovery dispute procedures and we'll get you back on the calendar. Take care.

C E R T I F I C A T E

STATE OF DELAWARE)
) ss:
COUNTY OF NEW CASTLE)

I, Deanna L. Warner, a Certified Shorthand Reporter, do hereby certify that as such Certified Shorthand Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 20-CV-136-RGA-JLH, *ID IMAGE SENSING LLC vs. OMNIVISION TECHNOLOGIES, INC.*, heard on February 16, 2022.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 24 typewritten pages, is a true copy of said **DISCOVERY CONFERENCE.**

SIGNED, **OFFICIALLY SEALED**, and **FILED** with the Clerk of the District Court, NEW CASTLE County, Delaware, this 24th day of February, 2022.

Deanna L. Warner, CSR, #1687
Speedbudget Enterprises, LLC

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